Supreme Court, U.S.
FILED
JUL 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-792

In The

Supreme Court of the United States

October Term, 1990

LESLIE SALT CO. and CARGILL, INC.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
JAMES S. BURLING
CHARLES A. KLINGE
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae, Pacific Legal Foundation and National Cattlemen's Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. WHETHER THE CORPS MAY REGULATE ISOLATED WATERS AND WETLANDS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT 5

A. The Corps Has Radically Expanded the Territorial Scope of Its Section 404 Permit Authority 7

B. The Corps Has Illegally Transformed Its Section 404 Permit Program into a Scheme to Exact Open Space from Owners of Private Property 9

II. THE DECISION BELOW IS CONTRARY TO THIS COURT'S INTERPRETATION OF CLEAN WATER ACT § 404 13

III. REGULATION OF ISOLATED WATERS AND WETLANDS CANNOT BE JUSTIFIED UNDER THE COMMERCE CLAUSE 16

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Page

Cases

California v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975), rev'd, 426 U.S. 200 (1976) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13, 16

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 18

Geer v. Connecticut, 161 U.S. 519 (1896)..... 18

Hodel v. Indiana, 452 U.S. 314 (1981) 18, 19

Hoffman Group, Inc. v. Environmental Protection Agency, 902 F.2d 567 (7th Cir. 1990) 12

Hough v. Marsh, 557 F. Supp. 74 (1982)..... 10

Hughes v. Oklahoma, 441 U.S. 322 (1979) 17, 18

Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978)..... 14

Maryland v. Wirtz, 392 U.S. 183 (1968)..... 17

Mulberry Hills Development Corporation v. United States, 32 E.R.C. 1195 (D. Md. 1989)..... 8

Municipality of Anchorage v. United States, 32 E.R.C. 1199 (D. Alaska 1990)..... 11

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 18

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 11, 12

Southern Pines Associates v. United States, 912 F.2d 713 (4th Cir. 1990)..... 12

TABLE OF AUTHORITIES CITED—continued

Page

Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (Table) 7

United States v. Larkins, 852 F.2d 189 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989) 9

United States v. Marathon Development Corporation, 867 F.2d 96 (1st Cir. 1989) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ..... *passim*

Wickard v. Filburn, 317 U.S. 111 (1942) 19

STATUTES

5 U.S.C. § 553(b)(3)(A), Administrative Procedure Act 7

33 U.S.C. § 1251, et seq., Clean Water Act § 101, et seq. 2, 3

§ 1319(c)(1)(A), Clean Water Act § 309(c)(1)(A) 6

§ 1341(a)(1), Clean Water Act § 401(a)(1) 10

§ 1344(a), Clean Water Act § 404(a) 3

§ 1362(6), Clean Water Act § 502(6) 15

§ 1362(7), Clean Water Act § 502(7) 3

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 616 3

TABLE OF AUTHORITIES CITED—continued

Page

RULES AND REGULATIONS

Supreme Court Rule 10.1(c) 5

Supreme Court Rule 37 1

33 C.F.R. § 326.3(e) (1989) 12

§ 328.3(a)(3) 4, 7

40 C.F.R. § 230.1(c) (1989) 10

§ 230.1(d) 10

§ 230.10(a) 10

§ 230.10(a)(3) 10

§ 230.42 10

51 Fed. Reg. 41,206 (1986) 4

UNITED STATES CONSTITUTION

Art. I, § 8, cl. 3 ..... 4, 5

MISCELLANEOUS

Douglas, William O., The Court Years, 1939-1975 (1980) 19

Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387 (1987) 19

Jackson and Nitze, Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future, 7 Pub. Land L. Rev. 21 (1986) 14, 15

TABLE OF AUTHORITIES CITED—continued

Page

Resource Development Council, Resource Review, Wetlands Policy Could Cripple Alaska's Economy, 5 (Oct. 1989) 9

Resource Development Council, Resource Review, Wetlands, 5 (Nov. 1989) 11

Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works, 94th Cong., 2d Sess. 62 (1976) 15

Tabler and Shere, EPA's Practice of Regulation-by-Memo, 5 Nat. Resources & Env't 3 (Fall 1990) 8

Testimony of Robert K. Dawson, Acting Assistant Secretary of the Army for Civil Works, Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 61 (1985). 15

Tribe, American Constitutional Law (2d ed. 1988) 17

Want, William L., Law of Wetlands Regulation (1990) 5, 8, 10

No. 90-792

In The

Supreme Court of the United States

October Term, 1990

LESLIE SALT CO. and CARGILL, INC.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and the National Cattlemen's Association (NCA) respectfully submit this brief amicus curiae in support of petitioners, Leslie Salt Company and Cargill, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

NCA is a nonprofit, tax-exempt corporation representing over 230,000 members nationwide. Many NCA members own land potentially subject to the regulatory power of the Army Corps of Engineers (Corps) under the theory of the court below. The disposition of this case will have a direct impact on the rights of those members.

The opinion below holds that the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, authorizes the Corps to exercise regulatory jurisdiction over temporary rainwater puddles. Amici believe that the ruling below is incorrect and will severely impact private property rights. Congress granted broad powers under the Clean Water Act to protect the nation's waters from pollution. However, Congress did not intend that the Corps regulate land, dry most of the year and hydrologically unconnected to open water, solely because migratory birds might use the land as habitat. Further, Congress' constitutional power to regulate interstate commerce does not authorize regulation of private land on such tenuous grounds. The public interest strongly supports limiting agency power to that granted by Congress and the Constitution.

STATEMENT OF THE CASE

This case involves the geographical limits of the Corps' regulatory jurisdiction under the Clean Water Act

(CWA or the Act). 33 U.S.C. § 1251, *et seq.*[1] Congress enacted the Clean Water Act for the purpose of improving water quality, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pursuant to this goal, Section 404(a) of the Act authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Act defines navigable waters as "waters of the United States including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). Thus, the statutory language "navigable waters" and "waters of the United States" define the geographical limits of Corps regulatory jurisdiction.

In this case, Leslie Salt Company owns 143 acres of land partially containing former crystallizers and calcium chloride pits once used in the salt manufacturing process. These artificially created pits temporarily hold rainwater during the winter rainy season. *See* Petitioners' Appendix at A-2.

The court below held that Corps regulatory jurisdiction over "waters of the United States" extends to these former crystallizers and calcium chloride pits. The opinion below concluded that the Corps properly asserted authority over the property as a "water" of the United States because migratory birds or an endangered species might use the property as habitat. *Id.* at A-12. This potential habitat theory, the court below reasons, is a valid interpretation of the Clean Water Act and authorizes regulation of temporarily wet, artificially created low areas as "waters of the United States."

---

[1] CWA's predecessor was the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 616. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

The Corps regulation at issue in this case is the "other waters" provision which defines "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1989). The Corps interprets the regulation to extend to any waters "[w]hich are or would be" used as habitat by migratory birds which cross state lines or as habitat for endangered species. 51 Fed. Reg. 41,206, 41,217 (1986). The court below determined that the potential habitat connection is a sufficient connection to interstate commerce for the purposes of satisfying the regulation and establishing congressional authority under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3. *See* Petitioners' Appendix A-11 and A-12.

As a whole, the "other waters" subsection of Section 328.3 is called the "isolated" waters and wetlands provision because these "other waters" are physically unconnected with other waters of the United States. *See* Petitioners' Appendix at A-31. The issue presented for this Court's resolution is whether the Clean Water Act grants the Corps regulatory power over isolated waters and wetlands, even temporary puddles, solely because wildlife might use the property as habitat. This Court specifically reserved the question of Corps authority over isolated waters and wetlands in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). Additionally, if Congress did go this far, the question presented raises the issue of whether regulating private

property to protect habitat for migratory birds or endangered species violates Congress' constitutional power under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

WHETHER THE CORPS MAY REGULATE ISOLATED WATERS AND WETLANDS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

The court below sanctions the Corps' radical expansion of territorial jurisdiction under Clean Water Act § 404. Accordingly, navigable waters has come to mean an isolated puddle theoretically suitable as a resting place for any bird crossing state lines. This potential habitat theory of jurisdiction brings millions of acres of private land within federal control without regard to clean water. In short, the Corps has abandoned the Act's water quality goals and transformed Section 404 into a national land planning and zoning law to protect open space.[2]

---

[2] *See* William L. Want, *Law of Wetlands Regulation* vii (1990), stating in reference to the Corps' regulatory program under the

(Continued on following page)

The Corps' expanding territorial limits cause dangerous uncertainty to landowners. Few of them could ever imagine that engaging in a simple productive activity on their own land, such as the ditch digging in this case, would require a permit from the federal government. Even fewer private property owners can afford the time (over five years in this case) or money to challenge agency jurisdiction and, thus, make a "federal case" out of a ditch digging or grading permit. In short, most affected property owners apply for a permit in the first instance, or after being notified by the Corps that the Act authorizes severe civil penalties and jail time for Section 404 violations.[3]

On paper, being subjected to Corps regulatory jurisdiction means having to apply for a permit before going forward with the project. In practice, the Corps uses the permitting program to expand the habitat protection zoning scheme read into the Act by administrative fiat. This overzealous regulatory expansion denies private property owners the reasonable use of their land without any improvement in water quality. Therefore, this Court's intervention is sorely needed to clarify whether private lands containing isolated waters and wetlands are subject to Corps permitting authority.

Clean Water Act, "[t]here is no other federal law that can be applied so much like a local zoning law, whereby local and national interest groups can, on general public interest and environmental grounds, decide the fate of major proposed developments. In a real sense, wetlands law can be considered a national zoning law."

[3] *See, e.g.*, CWA § 309(c)(1)(A), 33 U.S.C. § 1319(c)(1)(A) (first offense of negligently discharging fill into waters of the United States is punishable by up to $25,000 per day of violation and one year imprisonment).

A. The Corps Has Radically Expanded the Territorial Scope of Its Section 404 Permit Authority

Section 404's regulatory history demonstrates the radical expansion of power by the Corps. Initially, the Corps limited its regulatory power to waters meeting a strict test of navigability. *See Riverside*, 474 U.S. at 123. Next, the Corps asserted jurisdiction over coastal and freshwater wetlands based on periodic inundation by adjacent open water. *See id.* at 124. Then, the Corps replaced the periodic inundation requirement and asserted power over any wetland "inundated or saturated by surface or groundwater." *See id.* This step severed the connection to open water, thus beginning the Corps' regulation over isolated waters and wetlands.[4] The sole limitation on the territorial jurisdiction was a requirement that degradation of the waters or wetlands must affect interstate commerce such as recreational travelers, fishing commerce, or industrial commerce. 33 C.F.R. § 328.3(a)(3). Finally, the Corps adopted the final blow, asserting jurisdiction over any waters "[w]hich are or would be used" as habitat by migratory birds, or habitat for endangered species. 51 Fed. Reg. at 41,217.[5]

---

[4] In *Riverside*, this Court approved the Corps' regulation of wetlands only so far as it applied to wetlands adjacent to open waters, and specifically reserved the question of whether the Act reached isolated waters. 474 U.S. at 124 n.2, 131 n.8.

[5] The Corps adopted this potential habitat theory of territorial jurisdiction without notice and opportunity for comment, thus promulgating a rule in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A). *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table). However, the Corps continues to rely on this potential habitat theory in every legal jurisdiction except the Fourth Circuit. *See* Petitioners' Appendix at A-46 to A-49.

The Corps has further extended its territorial reach since 1986 without even a notification in the Federal Register prior to promulgation. In 1987, the Corps published a manual which technically described how to delineate or define both adjacent and isolated wetlands for purposes of regulation under Section 404. That is, the manual purported to distinguish between wetlands and nonwetlands. The fundamental requirement for finding a wetland was the concurrent presence of three conditions: saturation with water, hydric soil, *and* a prevalence of plants adapted to such wet areas. In 1989, a new manual[6] was adopted expanding further the geographic scope of Section 404; the new manual allows the Corps to assume that one or two of the prerequisite conditions exists due to the confirmed presence of others.[7] In this case, the Corps' jurisdiction goes beyond this tenuous definition of "wetlands" to cover temporary puddles. Now, a mere showing of some rainwater and the potential for bird bathing is sufficient to bring land within Corps power.

The Corps uses the potential habitat theory to assert regulatory power over all categories of "other waters"

---

[6] Federal Interagency Committee for Wetland Delineation. 1989. *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. United States Army Corps of Engineers, United States Environmental Protection Agency, United States Fish and Wildlife Service, and United States Department of Agriculture Soil Conservation Service, Washington, D.C., Cooperative technical publication (January, 1989). This agreement was entered into without notice or opportunity for public comment. Pending litigation challenges the manual as a rule promulgated without proper procedures. *Mulberry Hills Development Corporation v. United States*, 32 E.R.C. 1195 (D. Md. 1989) (motion for reconsideration pending). For a critical view of agencies regulating by memorandum, *see* Tabler and Shere, *EPA's Practice of Regulation-by-Memo*, 5 Nat. Resources & Env't 3 (Fall 1990) (causes poor decisions and short-circuits the political process).

[7] *See* Want, *supra* note 2, at 2-11.

such as, isolated wetlands, vernal pools, and prairie potholes, which may be miles from open water. Isolated wetlands alone easily encompass millions of acres in the continental United States. *See* petition at 8 n.10. In Alaska, fully 74% of nonmountainous land or at least 170 million acres are estimated to be wetlands with a substantial percentage being isolated wetlands. *See* Resource Development Council, *Resource Review*, "Wetlands Policy Could Cripple Alaska's Economy" 5 (Oct. 1989). The decision below drastically expands the reach of the Corps beyond these millions of acres by including mere temporary rain puddles as another navigable water.

In a case before the United States Court of Appeals for the Sixth Circuit, the scope of this broad jurisdiction over isolated waters and wetlands was discussed:

> "[T]he Corps has now expanded the definition of 'navigable waters' to include any creek or stream or moist area. . . . A farmer's low lying farmland or a homeowner's low lying backyard —adjacent to a small stream or creek but many miles from any navigable waterway—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission." *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merritt, C.J., concurring), *cert. denied*, 489 U.S. 1016 (1989).

And, the facts in this case go even further. Here, the moist area is not even adjacent to a stream or creek. Thus, the regulation reaches even more private property.

B. The Corps Has Illegally Transformed Its Section 404 Permit Program into a Scheme to Exact Open Space from Owners of Private Property

In *Riverside*, this Court assumed that overbroad regulations reaching insignificant "waters" could be remedied

through issuance of permits. 474 U.S. at 135 n.9 (referencing wetlands adjacent to navigable waters).[8] However, the Corps' permitting program may mean either no development or very expensive development due to oppressive mitigation conditions. Often, expensive mitigation measures are required even for projects in low quality isolated waters and wetlands which provide neither water quality benefits nor useful wildlife habitat. Thus, the permitting program is not a reasonable remedy for overbroad regulations, but an opportunity for the Corps to expand its habitat protection scheme by exacting valuable property rights.

Section 404(b)(1) of the Act mandates the preparation of guidelines for evaluating Section 404(a) permit applications. The guidelines create a presumption against discharges of fill into any "waters" of the United States. *See* 40 C.F.R. § 230.1(c) (1989); *see also* Want, *supra* note 2, at 6-8 n.32. The guidelines treat the filling of special aquatic sites, including isolated wetlands and mudflats, as "among the most severe environmental impacts covered" by the guidelines. 40 C.F.R. §§ 230.1(d) and 230.42. Accordingly, the guidelines flatly prohibit filling isolated wetlands and mudflats if practicable alternatives exist, even if the "water" is not useful for water quality or wildlife habitat. 40 C.F.R. § 230.10(a). Further, practicable alternatives are presumed to exist for all nonwater-dependent projects unless clearly demonstrated otherwise. 40 C.F.R. § 230.10(a)(3). These onerous regulations have stopped even small development projects on minuscule "waters," thus severely interfering with reasonable property use. *See Hough v. Marsh*, 557 F. Supp. 74, 83-84 (1982) (developer of two homes, requiring filling of

---

[8] But, permits may not be available. For example, states may deny certification to federal permits, making the general or individual permits absolutely unavailable as remedies to private property owners. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); *see United States v. Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989).

one-quarter acre wetland, failed to "clearly demonstrate" that no practicable alternative existed).

Once the Corps has the permit applicant over the proverbial barrel, the exactions begin through the use of mitigation conditions. Specifically, the Corps and the Environmental Protection Agency have entered into a Memorandum of Agreement demanding "no net loss of wetlands."[9] This agreement imposes absolute mitigation requirements on all individual permits even for filling low quality isolated wetlands, or where the public need for the project is great. For example, the Municipality of Anchorage, Alaska, needed a Corps permit to fill 14 acres for infrastructure expansion at its port, but the federal government demanded off-site mitigation costing up to $1 million. Resource Development Council, *Resource Review* "Wetlands" 5 (Nov. 1989). Anchorage Mayor, Tom Fink, called the mitigation conditions "extortion." *Id.*

This Court has recognized that private property ownership includes the right to build and the right to make productive use of property, "subject[ ] to *legitimate* permitting requirements." *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) (emphasis added); *see also Riverside*, 474 U.S. at 127. In *Nollan*, this Court ruled that if a state agency has authority to deny the permit outright, the agency could instead grant the permit subject to conditions that ameliorate the harms that would have justified denial.

---

[9] *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines* 2 (Feb. 7, 1990). This is another example of regulation by memorandum without notice and opportunity for public comment, *see supra* notes 4 and 7, being challenged in the courts as a rule promulgated without proper procedures. *Municipality of Anchorage v. United States*, 32 E.R.C. 1199 (D. Alaska 1990) (motion for reconsideration denied, notice of appeal due March 5, 1991).

483 U.S. at 835.[10] With isolated waters and wetlands, the Corps is without authority to deny these permits in the first place because the private property is beyond the territorial jurisdiction of the agency. Therefore, the Corps has no authority to impose permit conditions. The Corps forces permit applicants into mitigation concessions based on the illegitimate assumption that the permit could be denied outright.[11] These illegitimate permitting requirements interfere with the landowner's private property rights and constitute "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted).

In sum, the Corps' regulatory program can be pictured as a creeping lava flow, threatening to consume vast amounts of private property in the country. "Navigable waters" are now defined to include temporary puddles. The goal of "water quality" is now a guise for acquiring open space and wildlife habitat. In short, the Clean Water Act permitting authority has been subverted into a tool for unrelated exactions. By administrative fiat, the executive agencies have radically expanded the Section 404 regulatory program beyond its legislative scope and intent, and all at the expense of private property.

---

[10] This Court went on to hold that a regulatory taking occurred because the condition imposed failed to "substantially advance" a legitimate governmental interest. 483 U.S. at 834.

[11] Private property owners may be forced into the permit program during a project on a mere assertion of agency power, and may need to spend substantial sums on restoration before having their permit application heard, despite holding a good faith belief that the agency has no jurisdiction. *See* 33 C.F.R. § 326.3(e) (no action on after-the-fact permit application until restoration complete); *see also Hoffman Group, Inc. v. Environmental Protection Agency*, 902 F.2d 567 (7th Cir. 1990), *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990) (agency compliance orders per CWA § 309(a) not reviewable until civil action filed by agency or permit denied).

II

THE DECISION BELOW IS CONTRARY TO THIS COURT'S INTERPRETATION OF CLEAN WATER ACT § 404

The agencies and the court below have abandoned the express intent of Congress. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, this Court concluded that the Clean Water Act in general and Section 404(a) in particular were intended by Congress to combat the problem of water pollution.[12] In the decision below, the Ninth Circuit failed to consider this Court's interpretation of Clean Water Act § 404(a) as stated in *Riverside*. Instead, the court below decided that the "waters" at issue were subject to Section 404(a), not because of the potential to cause water pollution, but solely due to the possibility that migratory birds might use the property. Petitioners' Appendix at A-11 and A-12. Thus, the decision below conflicts with an applicable decision by this Court.

This departure from congressional intent stems from the Ninth Circuit's failure to apply this Court's two-step approach for analyzing agency interpretations of statutes as announced in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). First, a court must determine whether Congress spoke to the issue and, if not, whether the agency's interpretation is reasonable or permissible. *Id.* In *Riverside*, this Court applied this two part test to evaluate the Corps' regulatory power under Clean Water Act § 404(a). 474 U.S. at 131.

In the opinion below, the Ninth Circuit fails to analyze whether Congress spoke to the precise issue at bar; namely,

---

[12] In *Riverside*, this Court said that any definition of "waters" subject to Section 404(a) must consider "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Riverside*, 474 U.S. at 132.

whether Congress intended the Clean Water Act to extend Corps regulatory power to a "water" based on migratory bird use, without any connection to water pollution. Instead, the court below states that Congress intended to extend Corps jurisdiction "to any aquatic features within the reach of the Commerce Clause power." Petitioners' Appendix at A-6. The court then cites for authority its own precedent supporting that proposition in dicta.[13] However, neither the decision below, nor any Circuit Court of Appeals decision, addresses the issue raised here; whether the Corps' regulatory power under the Clean Water Act extends to a marginal wetland area, tenuously classified as a "water," the filling of which has no effect on water pollution.

This Court specifically stated that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside*, 474 U.S. at 133. Thus, this Court found that Congress invoked *powers* under the Commerce Clause, but this Court did *not* rule that Congress invoked *all* its power under the Commerce Clause, as the Ninth Circuit held. A comprehensive reading of the legislative history indicates that Congress intended to regulate only water connected with *waterborne* commerce.[14]

---

[13] The court cites *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755-56 (9th Cir. 1978) (holding that Corps jurisdiction extends to periodically inundated diked lands which formerly were marshlands subject to the ebb and flow of tide: "We express no opinion on the outer limits to which the Corps's [*sic*] jurisdiction under the FWPCA might extend") and *California v. Environmental Protection Agency*, 511 F.2d 963, 964 n.1 (9th Cir. 1975) (holding that federal agencies are required to comply with state water pollution permit programs), *rev'd*, 426 U.S. 200 (1976).

[14] *See* Jackson and Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*,

(Continued on following page)

In *Riverside*, this Court found that extending Corps jurisdiction beyond open water to adjacent wetlands was reasonable due to the "evident breadth of congressional concern for protection of water quality," and the interrelated nature of navigable waters and adjacent wetlands. 474 U.S. at 133. Contrarily, the Corps has never shown that putting clean fill dirt[15] on this category of "other waters," namely isolated crystallizers and calcium chloride pits containing rainwater, impacts water pollution in any manner. This is clearly because these waters do not connect hydrologically to any other water body. Petitioners' Appendix at A-13. Rather, the Corps asserts that these isolated "waters," which remain dry land most of the year, and other isolated wetlands must be protected as potential habitat or open space for wildlife pursuant to the Clean Water Act.[16]

---

7 Pub. Land L. Rev. 21, 33 (1986). (Congress intended to limit Corps jurisdiction to "all waters covered by the expanded judicial interpretations of [navigable waters], but no others.")

[15] Although not raised by petitioners, there is some question whether Congress intended to regulate the discharge of clean fill dirt as a pollutant. The definition of pollutant includes dredged spoil, but not fill or dirt. CWA § 502(6), 33 U.S.C. § 1362(6). According to Senator Muskie, the word fill was added to Section 404 to make clear that Congress intended to regulate the discharge of dredge spoil on land which is then called fill. *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 62 (1976).

[16] The Corps asserts this despite the fact that as recently as 1985, the Corps' civilian supervisor told Congress: "One significant point to recall is that the Congress did not design Section 404 to be a wetland protection mechanism and it does not function well in that capacity." Testimony of Robert K. Dawson, Acting Assistant Secretary of the Army for Civil Works, *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 61 (1985).

The decision below holds that Corps jurisdiction over an isolated "water" is reasonable due solely to migratory bird use—without any effect on water quality. Congress' clear intent was to grant the Corps authority to combat water pollution; Congress never intended that mere use by migratory birds act as the surrogate to extend Corps regulatory power to any wet area. Thus, the decision below violates this Court's admonition that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

III

REGULATION OF ISOLATED WATERS AND WETLANDS CANNOT BE JUSTIFIED UNDER THE COMMERCE CLAUSE

This Court need not go beyond petitioners' argument that Congress did not intend to regulate the isolated waters at issue in this case in order to conclude that this case warrants review. However, in the event that this Court were to conclude that Congress *did* intend to regulate these isolated waters, certiorari must still be granted because by attempting to regulate isolated waters and wetlands Congress is exceeding the scope of its constitutional authority.

Petitioners' statement that "Congress was aware that, constitutionally, it could reach further," petition at 14, is too generous. Similarly, the opinion below is inaccurate when it states that "[t]he Commerce Clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which *may* provide habitat to migratory birds or endangered species." Petitioners' Appendix at A-12 (emphasis added). Amici urge that there is an independent ground for granting certiorari in this case—the ground that Congress lacks altogether the authority under the Commerce Clause to regulate

isolated waters and wetlands that do not significantly affect interstate commerce.

In essence, by attempting to regulate Leslie Salt's property, the Corps of Engineers has adopted the "glancing duck" theory of jurisdiction[17]—if a flying duck were to look down and see standing water, then the duck might consider landing on the water, and the duck's glance would be an effect on interstate commerce. But as this Court has stated, the Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968). *See also* Tribe, *American Constitutional Law*, § 5-7 at 313-14 n.2 (2d ed. 1988).

The Commerce Clause provides Congress substantial authority to regulate activities that directly or indirectly affect commerce, not the enumerated power to regulate potential duck landing zones.[18]

The court below relies upon *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979), a case dealing with the interstate transportation of minnows, for the proposition that Commerce Clause power extends to the regulation of *potential* habitat of migratory bird or endangered species because Congress has Commerce Clause power over wildlife. *See* Petitioners' Appendix at A-12. This is a seriously distorted gloss on *Hughes* that fails to put that case in its proper

---

[17] The glancing duck theory is a graphic description of the potential habitat theory of jurisdiction extensively discussed, *supra*.

[18] Indeed, if the federal government's Commerce Clause power reaches to all lands that collect rainfall because wildfowl and endangered species might use that land, why not all fields of grain that might attract migratory birds? Why not all uplands where a migratory bird might nest? Indeed, under the Ninth Circuit's rubric, the only land that could *not* be regulated by the federal government under the Commerce Clause would be fresh lava beds and glaciers.

context—which was the ability of a state to impede interstate commerce in animals. *Hughes* has nothing to do with the question of whether or not all potential *habitat* for wildlife falls under federal Commerce Clause jurisdiction. *Hughes* merely found that once wildlife enters the stream of commerce (which usually occurs after killing or capture) a state cannot place burdens upon interstate commerce unless the traditional Commerce Clause burden tests are met. *Hughes*, 441 U.S. at 336.[19]

The proper test for determining whether a statute fits under the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

> "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[20]

---

[19] For a time there existed the belief fostered in the 19th century that once wild animals were reduced to possession, states retained some sort of title in those animals and could prevent their introduction into interstate commerce. *See Geer v. Connecticut*, 161 U.S. 519, 530 (1896). As discussed in *Hughes*, this principle was eroded over time. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), it was noted that a state's "title" over game animals was an anachronistic concept and could not be used by a state to discriminate against out-of-state fishermen. *See Hughes*, 441 U.S. at 334-35. Finally, in *Hughes* the controversy was put to rest: A state's interest in its wildlife and natural resources was not sufficient justification, *a fortiori*, for placing a burden upon interstate commerce. *Hughes*, 441 U.S. at 336. *But see* dissenting opinion of Chief Justice Burger and Justice Rehnquist in *Hughes*, 411 U.S. at 339-46 (*Geer* remains good law because the "ownership" theory is shorthand for a state's strong interest in conserving its resources).

[20] The impact on commerce must be "substantial." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24, 26 (1937).

There is no showing whatsoever in the legislative history of the Clean Water Act that land use activities on isolated waters and wetlands affect interstate commerce. Congress nowhere found that the viability of migratory waterfowl or endangered species populations is dependent upon the preservation of such isolated wetlands. There is, therefore, no congressional finding on which to examine the rational basis test. The first prong of the *Hodel* test fails. The second prong is likewise suspect because the nexus between interstate commerce in migratory birds and wildlife has not been shown to be connected, reasonably or otherwise, to a permitting program on isolated waters and wetlands. These isolated waters and wetlands have not been shown to contain significant reservoirs of animal habitat—and certainly have not been shown to be more habitable than any other area of thoroughly dry land. Thus, even if Congress had intended to extend the reach of its jurisdiction to isolated waters and wetlands, that reach would violate the limits of the Commerce Clause.[21]

---

[21] This Court, of course, must be cautious before extending the already stretched Commerce Clause beyond the breaking point. The Commerce Clause has already been generously interpreted. *See Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975*, at 50 (1980). Already, cogent arguments have been made that the New Deal extensions of the Commerce Clause are doctrinally insupportable. *See* Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1449-554 (1987). Even if it were accepted that the Court's interpretation of the Constitution must conform to modern perceptions of public policy, it is asserted that the New Deal policy reasons in favor of increased federal intervention in commerce are the result of flawed economic theory. *Id.* at 1453.

CONCLUSION

Whether the Clean Water Act authorizes regulation of private property on the sole basis of protecting open space for wildlife habitat is an issue needing definitive resolution by this Court. The present case should now be reviewed, not only to resolve this issue and prevent the injustices that would otherwise result, but also to remove the expansive Commerce Clause reasoning in the opinion below.

DATED: January, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
JAMES S. BURLING
CHARLES A. KLINGE
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae, Pacific Legal Foundation and National Cattlemen's Association